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No. 00-1011

In The

Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL.,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that, under 8 U.S.C. 1252(a)(2)(C), it lacked jurisdiction on direct petition for review over petitioners' statutory and constitutional challenges to their final removal orders, but that the district courts had habeas corpus jurisdiction to entertain those challenges under 28 U.S.C. 2241.

2. Whether IIRIRA's amendments to the Immigration and Nationality Act violate the Suspension of Habeas Corpus Clause, Article III, or the Due Process Clause of the Fifth Amendment if they preclude all review of petitioners' constitutional or statutory claims.

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OPINIONS BELOW

The court of appeals opinion, 232 F.3d 328 (2d Cir. 2000), is reproduced at Pet. App. 1a. The related court of appeals opinion in *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), is reproduced in the appendix to the petition in No. 00-767. The rulings of the immigration judges and Board of Immigration Appeals for the three petitioners are reproduced at Pet. App. 34a and Pet. App. 37a for Calcano-Martinez; at Pet. App. 40a, Pet. App. 43a and Pet. App. 48a for Madrid; and at Pet. App. 50a and Pet. App. 66a for Khan.

JURISDICTION

The court of appeals entered its judgment on September 1, 2000. On November 21, 2000, Justice Ginsburg extended the time within which to file a petition for writ of certiorari until December 30, 2000. The petition for writ of certiorari was filed on December 21, 2000, and granted on January 12, 2001. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth in an appendix to this brief. App. 1a-3a. Portions of the Suspension of Habeas Corpus Clause of the Constitution, U.S. Const. Art. I, § 9, cl. 2; the Due Process Clause of the Fifth Amendment; and Article III of the United States Constitution are set forth at Pet. App. 75a.

STATEMENT

The issue in this case is whether a ruling by the Board of Immigration Appeals (BIA) on a pure question

of law compelling the deportation of longtime legal permanent residents can be completely insulated from any judicial scrutiny. The government asserts that no court has jurisdiction to determine whether these administrative orders rest on an impermissible construction of the Immigration Act. The government's position is that the judiciary is entirely foreclosed from considering petitioners' claims and, further, that such complete preclusion presents no constitutional concerns.

The court of appeals rejected the government's contentions. While concluding that its own jurisdiction under the Immigration Act to review petitioners' claims through a petition for review had been repealed, the Second Circuit ruled that the district courts retained their historic jurisdiction under the federal habeas corpus statute, 28 U.S.C. 2241, to address the validity of petitioners' removal orders. In a companion case, *INS v. St. Cyr*, No. 00-767, the Second Circuit relied on its jurisdictional decision in this case, upheld the district court's exercise of habeas jurisdiction, and held on the merits that the BIA had erred on a statutory retroactivity question like the one raised by petitioners here. The government has asked this Court to reverse that decision on the merits, but its principal position is that both the district court and the court of appeals lack jurisdiction over the type of statutory retroactivity claims presented in *St. Cyr* and this case.

To be sure, the question of whether petitioners' claims are properly reviewed in the district court or the court of appeals is an important one. But it is also a secondary question for two reasons. First, petitioners would be satisfied with review in either court. Second, the government's view is that neither court may properly exercise jurisdiction over petitioners' claims. Thus, the fundamental question that this Court must resolve is

whether *any* court has jurisdiction to hear the pure questions of law that petitioners assert.

A. Legal Background.

In 1996 Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 (Sept. 30, 1996). IIRIRA created new provisions governing judicial review of immigration orders, which are set forth at 8 U.S.C. 1252. Like the prior statute, Section 1252 vests the courts of appeals with jurisdiction to review final orders of "removal" (a new term that embraces what were formerly described as deportation and exclusion orders). Unlike the pre-existing statute however, Section 1252 also contains a preclusion provision, entitled "Matters not subject to judicial review." 8 U.S.C. 1252(a)(2). Subsection (C) of that preclusion provision states in relevant part that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against any alien who is removable by reason of" certain designated criminal offenses.

The preclusion statute has given rise to two principal jurisdictional questions regarding aliens who, like petitioners, are deportable on the basis of designated criminal offenses. The first goes to the *scope* of review. Did Congress (and can Congress) preclude the courts from reviewing the type of pure question of law at issue here? The second goes to the proper *forum* for such aliens to seek judicial scrutiny of their final removal orders. Is that forum in the court of appeals (through a petition for review) or a district court (through a habeas corpus action, 28 U.S.C. 2241)? Most circuits, including the Second Circuit, have held that the proper *forum* for petitioners' claims is a habeas corpus action in district court under 28 U.S.C. 2241 and that the scope encompasses the

type of statutory claims petitioners present.[1] A few circuits have concluded that all review must be sought in the court of appeals by a petition for review, but have not decided whether the *scope* of review would insulate petitioners' claims from all judicial scrutiny.[2]

In earlier litigation under similar preclusion statutes enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and IIRIRA's "transitional" rules, ten of eleven circuits to consider these questions held that a Section 2241 habeas action in district court was the proper forum, and that the scope encompassed the type of statutory retroactivity claim raised by petitioners here.[3] The one circuit that placed review in the court of appeals suggested that the scope of review encompasses petitioners' claims: "It seems unlikely that Congress would have wanted the Board to

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[1] Pet. App. 1a (opinion below); *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000), *petition for cert. filed sub nom. Rodriguez v. INS*, No. 00-753; *Mahadeo v. Reno*, 226 F.3d 3 (1st Cir. 2000), *petition for cert. filed*, No. 00-962; *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000).

[2] *See Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000) (leaving scope unresolved), *petition for cert. filed*, No. 00-6280; *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999) (same), *cert. denied*, 529 U.S. 1036 (2000).

[3] *See Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999), *cert. denied*, 529 U.S. 1041 (2000); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999).

have the final word on so pure and fundamental a question of law as when the statute went into effect." *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998) (Posner, C.J.), *cert. denied*, 528 U.S. 1153 (2000).

B. Petitioners' Merits Claims.

The underlying merits issue in this case – although not presented in the present case, *see INS v. St. Cyr*, No. 00-767 – is one of statutory retroactivity under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Under the Immigration and Nationality Act (INA), a wide range of criminal convictions are grounds for deportation. *See* 8 U.S.C. 1227(a)(2) (listing criminal offenses). These apply to any alien, regardless of legal status, length of residence in the United States, service in the military, or familial relationships to American citizens.

For decades, the INA has provided for a discretionary waiver of deportation to allow amelioration of the rigid application of the deportability provisions in the case of legal permanent residents who commit deportable criminal offenses. At the time of petitioners' offenses, that waiver was codified at former 8 U.S.C. 1182(c). The eligibility criteria were set by statute and limited the waiver to legal permanent residents who had maintained an uninterrupted lawful domicile in the United States for seven years. Statistics from the Justice Department show that the waiver has historically been granted in approximately half of the cases. *See Goncalves v. Reno*, 144 F.3d 110, 128 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999).

Petitioners met the statutory eligibility criteria of Section 1182(c) at the time of their crimes or convictions. However, IIRIRA created new bars to relief under the functionally equivalent relief provision of IIRIRA, which is called "cancellation of removal." 8 U.S.C. 1229b. If the new bars to relief apply to petitioners, they are prohibited

from seeking discretionary relief despite their family ties in this country and their long-term status as permanent residents. The government maintains that no court has jurisdiction to decide whether Congress expressed the clear intent necessary to apply the new bars to relief retroactively, i.e., to events before their enactment. *See Landgraf*, 511 U.S. at 280.[4]

C. Factual Background.

Petitioners concede that their offenses render them deportable, but each has sought to apply for a waiver of deportation under former Section 1182(c). In all three cases, the BIA ruled that Section 1182(c) had been repealed by IIRIRA as of April 1, 1997, and that the repeal applied to all cases in which administrative immigration proceedings had commenced on or after that date. The Board rejected petitioners' contention that the repeal should not apply retroactively to cases, like theirs, where the event triggering deportation occurred prior to passage of IIRIRA and AEDPA. Because the BIA denied Section 1182(c) relief as a matter of law, the Board never purported to exercise its discretion. Instead, it issued final orders of removal on the ground that petitioners had committed deportable offenses and were statutorily ineligible to seek any relief from deportation.

Petitioner Deboris Calcano-Martinez was admitted as a lawful permanent resident in 1971 at the age of three. Pet. App. 5a. She has four children who are United States

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[4] Prior to IIRIRA, AEDPA amended Section 1182(c) and expanded the list of disqualifying criminal offenses. Petitioners' contention on the merits is that neither AEDPA's nor IIRIRA's provisions apply retroactively to conduct that occurred before enactment of both laws. The Second Circuit's merits ruling in No. 00-767 addresses both AEDPA and IIRIRA.

citizens. *Id.* In April 1996, she pled guilty in a New York State court to the offense of attempted criminal sale of a controlled substance in the third degree and received an indeterminate sentence of one to three years. Pet. App. 5a-6a. The INS instituted removal proceedings in June 1997 on the ground that her criminal conviction rendered her deportable under 8 U.S.C. 1227(a)(2)(A)(iii) (aggravated felony), and 1227(a)(2)(B)(i) (controlled substance offense). Pet. App. 35a. The BIA refused to consider her application for Section 1182(c) relief and issued a final order of removal.

Petitioner Sergio Madrid became a lawful permanent resident in 1989 at the age of seventeen. Pet. App. 7a. In September 1994, he was convicted in a New York State court of the offense of criminal sale of a controlled substance in the second degree. He received an indeterminate sentence of four years to life imprisonment but was released after approximately four years. Pet. App. 7a. The INS instituted removal proceedings in June 1997 under 8 U.S.C. 1227(a)(2)(A)(iii) (aggravated felony) and 1227(a)(2)(B)(i) (controlled substance offense). Pet. App. 45a. The BIA refused to consider his application for Section 1182(c) relief and issued a final order of removal.

Petitioner Fazila Khan was admitted to the United States as a lawful permanent resident in 1987. Pet. App. 7a-8a. Her four-year-old daughter, mother, sister, and five of her aunts and uncles are all United States citizens. Pet. App. 8a. In 1996, petitioner pled guilty to a controlled substance offense committed in March 1996, for which she received a four-month sentence followed by a one-year period of supervised release. Pet. App. 8a, 59a. The INS initiated removal proceedings against Khan in May 1997 on the ground that she was deportable as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 8a.

The BIA refused to consider her application for Section 1182(c) relief and issued a final order of removal.

D. Proceedings Below.

Petitioners all filed petitions for review in the court of appeals seeking review of their final orders of removal on two grounds. Petitioners' principal claim is that IIRIRA's change in eligibility criteria does not apply retroactively to events that occurred before passage of the 1996 amendments. Petitioners also contend that if the new bar to relief does apply to them, it would violate due process and equal protection. Because of the jurisdictional uncertainty engendered by IIRIRA, petitioners also filed district court habeas actions raising the same statutory and constitutional claims. The district courts have declined to adjudicate those actions pending a final disposition of the instant petitions for review. Pet. App. 6a-8a.

In the Second Circuit, the government argued that the district courts' traditional habeas corpus jurisdiction had been repealed and that the court of appeals' jurisdiction by petition for review is limited to two types of inquiries. The government contended, first, that aliens could file petitions for review to challenge whether they fall within the language of Section 1252(a)(2)(C), and thus, could challenge the BIA's finding that they are (i) aliens, (ii) who are removable, (iii) on the basis of a listed offense.[5] The government also contended that aliens who are removable on the basis of a listed offense could raise "substantial constitutional" challenges to their removal order, even though the preclusion language of Section

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[5] The court of appeals, in an earlier opinion, agreed with that position. *See Bell v. Reno*, 218 F.3d 86, 89 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 784 (2001).

1252(a)(2)(C) does not differentiate between constitutional and nonconstitutional claims. As to petitioners' specific claims, the government asserted that petitioners could not raise their statutory retroactivity claim in any court, and that petitioners' constitutional claims were not substantial and were therefore unreviewable.

The court of appeals rejected the government's contention that the pure questions of law raised by petitioners were unreviewable in any court. The court of appeals first held that, under circuit precedent (interpreting the analogous preclusion statutes in AEDPA and IIRIRA's transitional rules) the new preclusion provision, Section 1252(a)(2)(C), repealed its own petition-for-review jurisdiction over the statutory and constitutional claims raised by petitioners. Pet. App. 28a-30a. The court of appeals then exhaustively analyzed each of the provisions of IIRIRA and held that none repealed the district courts' habeas jurisdiction under 28 U.S.C. 2241 to hear petitioners' claims. Pet. App. 21a-28a. Accordingly, the court of appeals dismissed the petitions for review for lack of jurisdiction without reaching the merits and held that petitioners could pursue their constitutional and statutory claims in their previously-filed district court habeas corpus actions.

The court of appeals also rejected the suggestion that review of only substantial constitutional claims was sufficient. The Second Circuit referred to its analysis in *Henderson v. INS*, 157 F.3d 106, 112-22 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999), in which the court had thoroughly reviewed the history of habeas corpus scrutiny of deportation orders. Pet. App. 30a. The opinion below reiterated the Second Circuit's earlier conclusion that "novel and profound constitutional questions" would arise if no judicial forum were available to raise pure

questions of constitutional or statutory law. Pet. App. 21a-22a.

SUMMARY OF ARGUMENT

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) enacted a new judicial review statute to govern judicial review of final orders of removal. As under prior law, IIRIRA generally provides that final orders of removal are reviewable in the court of appeals by a petition for review. IIRIRA also enacted a preclusion provision (8 U.S.C. 1252(a)(2)(C)) that prohibits judicial review of final orders in the case of aliens, like petitioners, who are deportable based on certain criminal offenses. Section 1252(a)(2)(C) prohibits broad APA-type judicial review, but it does not eliminate the level of judicial scrutiny historically provided over deportation orders by habeas corpus. Nor could the statute survive constitutional scrutiny if it prohibited the minimum level of review historically afforded in habeas corpus for aliens facing deportation.

During a long period of American history, from 1891 until the 1950s, deportation and exclusion orders issued by administrative immigration officers were "final" under the immigration statutes and were held by this Court to be immune from "judicial review." Nonetheless, throughout this period, this Court – in dozens of cases – held that aliens were entitled to challenge their orders in habeas corpus. Although the scope of habeas inquiry is narrower than judicial review under the APA, this Court (as well as the lower courts) made clear that habeas corpus encompassed review of the *legality* of the deportation order. Accordingly, this Court consistently adjudicated claims of statutory construction to ensure that immigration officials acted within the bounds of the law

and did not transgress the authority conferred upon them by statute.

In *Heikkila v. Barber*, 345 U.S. 229, 236 (1953), the Court reviewed this era and held that "judicial review" was distinct from habeas corpus and that "it is the scope of inquiry on habeas corpus that differentiates use of the writ from judicial review as that term is used in the Administrative Procedure Act." *Heikkila* further emphasized that until the APA became applicable to review of deportation orders, the immigration statutes had "preclud[ed] judicial intervention except insofar as required by the Constitution." *Id.* at 234. Yet, throughout that earlier period this Court reviewed constitutional *and* statutory claims, making clear that the minimum level of habeas review exercised during this period cannot be abrogated. Like the preclusion provisions in those earlier laws, Section 1252(a)(2)(C) can and should be construed to permit review of the pure questions of law raised here.

Indeed, the government's view of the statute would render it plainly unconstitutional. The core of the Great Writ, protected by the Suspension Clause, ensures that there will not be *executive detention* without judicial process. In addition, the prohibition of all review would raise distinct constitutional problems under the Due Process Clause and Article III.

Two avenues are available for preserving the scope of review required by habeas corpus and avoiding the profound constitutional questions that would be presented if petitioners' claims were barred. One alternative, adopted by the court of appeals, is to preserve habeas corpus under the federal habeas corpus statute, 28 U.S.C. 2241. As numerous lower courts have held, none of the provisions enacted by Congress contain the express directive necessary to repeal Section 2241. Alternatively, the Court could construe the preclusion provision to preserve direct

review in the court of appeals by a petition for review over those claims historically cognizable in habeas corpus. Such an alternative to Section 2241 is constitutionally permissible, *provided* that the scope of review in the court of appeals is commensurate with the level of review that would be available under Section 2241. Either construction of the statute avoids the far-reaching constitutional questions that would be triggered by a statute that repealed all jurisdiction in any court over petitioners' claims.

ARGUMENT

I. THE HISTORY OF IMMIGRATION LAW IN THIS COUNTRY SHOWS THAT IIRIRA DOES NOT AND CONSTITUTIONALLY COULD NOT DEPRIVE ALIENS OF A JUDICIAL FORUM TO ASSERT THEIR STATUTORY AND CONSTITUTIONAL CLAIMS.

The Board of Immigration Appeals held that petitioners are subject to mandatory deportation, without any opportunity to apply for a waiver, based on its construction of the temporal scope of recent amendments to the Immigration Act. The Board's generally-applicable legal ruling must be subject to review in some court, at some point. At a minimum, there must be habeas corpus (or its equivalent) to review the Board's legal ruling. There is no authority and no tradition that sanctions deportation based solely on an administrative agency's construction of a law. Nor is there anything in IIRIRA that compels the Court to reach the profound constitutional questions that would be raised if a statute – for the first time in the Nation's history – were to vest unreviewable authority in an administrative agency over pure questions of law where an individual's liberty is at stake. The preclusion

statute can and should be construed to avoid the "novel and profound constitutional questions" that would be presented if IIRIRA were to prohibit all judicial scrutiny, including by habeas corpus, of petitioners' claims. *See* Pet. App. 21a-22a (citing *Felker v. Turpin*, 518 U.S. 651 (1996)); *see also Bowrin v. INS*, 194 F.3d 483, 489 (4th Cir. 1999) (finding potentially serious constitutional questions if habeas review of same type of claims were barred); *see generally DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

A. Overview: Evolution Of Judicial Review In The Immigration Context.

1. Pre-1996 judicial review scheme.

The 1996 amendments are the latest in a long line of amendments to the judicial review statutes governing immigration. Historically, deportation orders were reviewable in the district court, principally by habeas corpus, and for a brief period by declaratory judgment actions under the Administrative Procedure Act. *See Heikkila v. Barber*, 345 U.S. 229, 235-36 (1953) (discussing history of habeas corpus review of immigration decisions); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51-52 (1955) (noting that 1952 Immigration and Nationality Act made APA applicable to deportation decisions, thereby permitting declaratory actions).

In 1961, Congress created the modern judicial review scheme, which governed until the enactment of IIRIRA in 1996. *See* Act of Sept. 26, 1961, § 5, 75 Stat. 651 (formerly codified at 8 U.S.C. 1105a) (setting forth basic review scheme under 1961 statute) (repealed by IIRIRA § 306(b)). The 1961 amendments gave the courts of appeals principal responsibility for reviewing deportation orders by means of a "petition for review." The scope of review in a petition for review was broad and provided the full range

of judicial review afforded under the Administrative Procedure Act, including review of questions of law, abuse of discretion, and the agency's factual findings. *Id.*

Two basic points emerge from the history of these pre-1996 judicial review provisions. The first is that the forum and mode of review have changed over time, from district court actions under pre-1961 law to petitions for review in the courts of appeals after 1961. The more critical point, discussed in detail below, is that there has always been a floor below which the *scope* of review has never fallen. That minimal scope of inquiry has been the level of judicial scrutiny afforded by habeas corpus. In the absence of broader APA-type review, habeas corpus has always been available as a safeguard for an alien facing deportation from the country.

The scope of inquiry in a habeas corpus action has historically been narrow and has not provided broad review of an immigration official's factual or discretionary determinations. But it has always guaranteed resident aliens the opportunity to challenge the *lawfulness* of their deportation orders, and thus, the right to obtain a ruling from an independent judicial tribunal as to whether an immigration officer's actions were based on a proper construction of the governing statutes.

Equally important, this minimal level of habeas review has been preserved by this Court in the face of recurrent attempts by Congress to render administrative immigration decisions "final" and beyond the power of courts to review. This history was summarized by the Court at length in *Heikkila*, 345 U.S. at 235-36. *Heikkila* emphasized that although the restrictive judicial review schemes enacted by Congress at the turn of the twentieth century, and for sixty years thereafter, were clearly intended to eliminate the courts from the deportation

process, the Court never interpreted the schemes as eliminating habeas scrutiny as a safeguard against unlawful deportation orders. The 1996 amendments to the INA were enacted against this backdrop, in which review has expanded at times beyond habeas corpus to include full APA-type judicial review, but has *never* fallen below the minimum level of habeas scrutiny.

2. 1996 amendments.

In 1996, Congress enacted three sets of jurisdictional amendments: those made by (i) AEDPA, which amended the 1961 Act, (ii) IIRIRA's *transitional* rules, which further amended the 1961 Act, and (iii) IIRIRA's *permanent* rules, which repealed and wholly replaced the provisions of the 1961 Act. The permanent IIRIRA rules directly govern this case because petitioners were placed into administrative removal proceedings after April 1, 1997.[6]

Under all three sets of 1996 amendments, the courts of appeals remain the principal forum for review of final deportation orders, as they were under the 1961 Act. *See generally Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999). The three sets of amendments also contain preclusion provisions that curtail review for aliens with certain criminal convictions. *See* AEDPA

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[6] Administrative cases initiated before April 1997 are governed by the 1961 Act as amended by either AEDPA or IIRIRA's transitional rules. AEDPA's amendments govern cases in which the alien was placed into immigration proceedings before April 1, 1997, and the deportation order became administratively final prior to October 31, 1996. *See Henderson*, 157 F.3d at 117. IIRIRA's transitional rules are applicable to cases in which the deportation order became administratively final on or after October 31, 1996. IIRIRA § 309(a). The transitional rules are set forth in IIRIRA § 309(c)(4), but are not codified in the U.S. Code.

§ 440(a); IIRIRA § 309(c)(4)(G) (transitional provision); 8 U.S.C. 1252(a)(2)(C) (permanent rule). In this respect, the 1996 amendments are unlike the 1961 Act (which contained no preclusion provisions), and are instead like the older immigration preclusion statutes discussed by the Court in *Heikkila*.

The 1996 preclusion provisions, including the permanent IIRIRA provision at issue here, unquestionably eliminate broad judicial review for aliens, like petitioners, who are removable on the basis of a listed criminal offense. The question posed by this case is whether the statute also eliminates even the minimal level of judicial scrutiny historically guaranteed by habeas corpus.

The secondary question posed by this case is whether the *forum* and *mode of procedure* that are available to petitioners to obtain review of their claims should be a habeas corpus action as such (under 28 U.S.C. 2241), or instead, some other mechanism for obtaining a commensurate level of review. As the Court has established, the Constitution protects the *scope* of the writ rather than its form. *See generally Swain v. Pressley*, 430 U.S. 372, 381 (1977) ("the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention" does not violate the Suspension Clause). Accordingly, a traditional habeas action under Section 2241 need not be available if IIRIRA is construed to preserve petitioners' right to obtain review of their legal claims by a petition for review in the court of appeals. The proper forum and mechanism for review are not, therefore, of constitutional dimension in this case. But if both the petition for review and the Section 2241 procedure are barred, then IIRIRA has denied a level of review that is required by the Constitution. Petitioners' central submission, therefore, is that IIRIRA does not, and constitutionally could not, reduce review below even the

minimal level of judicial scrutiny traditionally afforded in habeas corpus actions.

B. As A Matter Of Statutory Construction, Section 1252(a)(2)(C) Does Not Preclude Habeas Corpus Scrutiny To Test The Legality Of The Deportation Order.

The preclusion statute at issue here is Section 1252(a)(2)(C) which, by its terms, restricts "judicial review" but nowhere mentions habeas corpus (or 28 U.S.C. 2241). It thus precludes "judicial review" under the APA (or other statutes), but it does not abrogate habeas corpus and should not be read to do so. That is particularly the case given the enormous constitutional questions that would be triggered by the repeal of even the minimum level of judicial scrutiny historically guaranteed by habeas corpus.

The Court has made clear that in the absence of any other means of commensurate review, habeas corpus will not be repealed by implication. For a statute to repeal habeas corpus, it must be express. That longstanding, constitutionally-driven principle was reiterated by the Court in *Felker v. Turpin*, 518 U.S. 651 (1996), just months before IIRIRA's passage. *See also Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869). Thus, in *Felker*, the Court held that although a bar on this Court's jurisdiction over successive habeas petitions filed by criminal defendants was broadly preclusive, it was insufficiently specific to repeal the Court's original habeas jurisdiction under Section 2241, noting that the preclusion statute nowhere "mentions" the Court's authority to entertain habeas petitions under that specific provision. *Felker*, 518 U.S. at 661-62; *Yerger*, 75 U.S. at 105 ("Repeals by implication are not favored"). This clear statement rule serves the critical function of compelling Congress to act explicitly when it legislates in

an area with grave consequences for individual litigants and with serious implications for the historic structural role played by the courts in overseeing administrative deprivations of liberty. Accordingly, under *Felker*, IIRIRA's general prohibition of "judicial review" does not repeal habeas corpus, because it nowhere mentions it.

The principle of preserving habeas corpus scrutiny has found specific application in the immigration context, where the Court has always preserved habeas corpus in the face of broad preclusion statutes. For over sixty years, immigration legislation contained statutory prohibitions designed to preclude judicial scrutiny of deportation orders. The Court consistently read those statutes as prohibiting the courts from reviewing immigration orders, yet never construed the statutes to limit the scope of review provided by habeas corpus.

1. Immigration statutes that preclude judicial review do not implicitly abrogate habeas corpus.

Congress began regulating immigration in 1875. *See* Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477. Between 1875 and 1891, the courts were authorized by the immigration acts to engage in broad review, including review of the facts on which the deportation or exclusion order rested. *See Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). In 1891, Congress enacted the first in a series of "finality" provisions designed to remove the courts from the immigration process. The 1891 statute provided: "All decisions made by the inspection officers . . . touching the right of any alien to land, when adverse to such right, shall be final. . . . " Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085. This first finality provision applied to non-Chinese "excludable" aliens (i.e., aliens seeking entry into the country). Thereafter, Congress enacted

additional finality provisions continually extending the provision in virtually the same terms to additional categories of aliens.[7]

In *Ekiu*, the Court interpreted the 1891 finality provision for the first time. The Court emphasized that the alien in that case was subject to the Act's "finality" provision and was thus precluded from obtaining the level of review previously authorized by immigration statutes. The Court made clear, however, that the alien could still obtain habeas corpus – even though the finality provision nowhere made such an exception.

> An alien immigrant, prevented from landing by any such officer claiming authority to do so under an Act of Congress, and thereby restrained of his liberty, *is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.* And Congress may, if it sees fit, as in . . . [prior] statutes . . . authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be intrusted by Congress to executive officers. . . .

Id. at 660 (emphasis added and citations omitted).[8]

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[7] The second statute, enacted in 1894, imposed the same "finality" language on decisions denying admission to Chinese aliens: "In every case where an alien is excluded from admission into the United States under any law . . . the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final. . . ." Act of Aug. 18, 1894, ch. 301, § 6, 28 Stat. 252, 253. Preclusion statutes in 1907 and 1917 also contained "finality" provisions and employed nearly identical language as the prior statutes. Immigration Act of 1917, ch. 29, § 17, 39 Stat. 874, 887; Immigration Act of 1907, ch. 1134, § 25, 34 Stat. 898, 906-07.

[8] The preclusive effect of the finality provision was repeatedly reiterated. *See, e.g., Lem Moon Sing v. United States,*

The finality provisions governed judicial scrutiny of immigration decisions until Congress passed the 1952 Immigration and Nationality Act, making the APA's provisions for broad judicial review applicable to immigration decisions. *See Pedreiro*, 349 U.S. at 52. During this more than 60-year period, the Court consistently reaffirmed *Ekiu's* holding that although the finality provisions precluded broad judicial review, aliens facing a loss of liberty were "doubtless entitled" to the minimal level of review afforded in habeas. *Ekiu*, 142 U.S. at 660. In case after case, the Court refused to close off all access to the courts and continually reaffirmed the alien's right to habeas corpus to test the lawfulness of the order. *See, e.g., Zartarian v. Billings*, 204 U.S. 170 (1907); *Lapina v. Williams*, 232 U.S. 78 (1914); *Lewis v. Frick*, 233 U.S. 291 (1914); *Yee Won v. White*, 256 U.S. 399, 400 (1921); *Kessler v. Strecker*, 307 U.S. 22, 34 (1939). Five decades after *Ekiu* interpreted the first finality provision, the Court reiterated in *Bridges v. Wixon*, 326 U.S. 135, 149 (1945), that judicial review was barred but that the Court's role in "habeas corpus proceedings" remained. *See also id.* at 167 (courts may act "[o]nly in the exercise of their authority to issue writs of habeas corpus") (Stone, C.J., *dissenting on other grounds*).

In 1953, at the very end of this habeas period, the Court in *Heikkila* summarized the entire era and once again reaffirmed the unbroken rule, now of longstanding

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158 U.S. 538, 546-47, 549 (1895) ("authority of the courts to review the decision of the executive officers was taken away"); *Fok Young Yo v. United States*, 185 U.S. 296, 305 (1902) (finality provision is "[c]ongressional action [that] has placed the final determination of the right of admission in executive officers, without judicial intervention"); *Pearson v. Williams*, 202 U.S. 281, 285 (1906) (finality provision was intended to render the decision final "where it is most likely to be questioned – in the courts").

duration, that an immigration statute that precludes broad judicial review will not be read to eliminate habeas corpus by implication. The specific issue in *Heikkila* was whether, in light of the then-recently enacted Administrative Procedure Act, aliens could now obtain the broader judicial review that had been denied them for the past sixty years under the finality provisions. That question turned on the preclusive reach of the immigration finality provisions because the APA does not apply where the governing statutes expressly "preclude judicial review." 5 U.S.C. 701(a)(1). Reviewing the long history of the Court's treatment of the immigration finality provisions (beginning with its decision in *Ekiu*), the Court reiterated once again that the finality provision precluded broad judicial review: "Clearer evidence that . . . [the finality provision] is a statute precluding judicial review would be hard to imagine." *Id.* at 235. Accordingly, the Court concluded that the APA was inapplicable. But the Court nonetheless reaffirmed the right to habeas corpus.

Notably, the dissent in *Heikkila* stressed that it was precisely because the finality provision had long been understood to permit "resort to the court" to obtain "habeas corpus" scrutiny of deportation orders that the finality provision could not be viewed as a statute that precluded "judicial review." *Id.* at 239-40 (internal quotation marks omitted). The Court, in response, acknowledged that the finality provision had permitted habeas review but stressed that "it is the *scope of inquiry* on habeas corpus that differentiates use of the writ from *judicial review* as that term is used in the Administrative Procedure Act." *Id.* at 236 (emphasis added). The Court reaffirmed the longstanding understanding that the immigration act's finality provision precluded broad "judicial review" but not the narrower "habeas" inquiry: "We hold that deportation orders remain immune to

direct attack," *id.* at 236, and that aliens may "attack a deportation order only by habeas corpus." *Id.* at 235.

Congress is presumed to have been aware of this unbroken history when it enacted Section 1252(a)(2)(C)'s prohibition on "judicial review" without any mention of a repeal of habeas corpus or 28 U.S.C. 2241. Like the broadly preclusive statutes that this Court interpreted during the habeas era, IIRIRA should not be read as precluding the minimal level of judicial scrutiny traditionally afforded by habeas corpus. *See also Carlson v. Landon*, 342 U.S. 524, 537 nn.27, 28 (1952) (contrasting "judicial review" with "judicial intervention under the paramount law of the Constitution" and citing cases exercising habeas corpus review) (internal quotation marks omitted); *Pedreiro*, 349 U.S. at 50 (noting that *Heikkila* treated finality statute as precluding "judicial review" but not "habeas corpus"). *See also Sandoval v. Reno*, 166 F.3d 225, 235 (3d Cir. 1999) (noting distinction between "review" and habeas corpus in immigration context and citing *Heikkila*). Construing Section 1252(a)(2)(C) to preserve this minimal level of review also avoids the delicate constitutional questions raised by the preclusion of review over petitioners' statutory or constitutional claims. *See Felker*, 518 U.S. at 661.

2. Habeas corpus review encompasses questions of law like those raised by petitioners.

It is indisputable that throughout the decades when jurisdiction over immigration orders was governed by the "finality" provisions, and review was thus limited to the narrow inquiry allowed by habeas corpus, the Court continually resolved disputes over the proper construction of the immigration statutes. *See, e.g., Gonzales v. Williams*, 192 U.S. 1 (1904) (rejecting administrative construction of terms "alien" and "alien immigrant"); *Mahler v. Eby*, 264

U.S. 32, 44 (1924) (holding that the executive had not complied "with all the statutory requirements" in exercising his delegated authority); *Delgadillo v. Carmichael*, 332 U.S. 388, 390 (1947) (rejecting government assertion that alien's arrival "was 'the entry of the alien to the United States' within the meaning of the [Immigration] Act"); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 8 (1948) (rejecting government's "meaning of the statutory words, 'sentenced more than once' ").[9]

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[9] The cases arose under each of the successive statutes that rendered the immigration decisions "final." Cases under the 1891 act include *Zartarian v. Billings*, 204 U.S. 170, 174, 176 (1907) (resolving on habeas "construction of this law and the meaning of the phrase" for purpose of deciding citizenship claims, while holding that "review by the courts" of challenge to executive decision that alien had "dangerous contagious disease" was barred because finding of immigration board is "final," citing *Ekiu*).

Cases under the 1894 act include *Yee Won v. White*, 256 U.S. 399, 400 (1921) (habeas corpus writ properly denied "unless, *as a matter of law*" alien could demand admission of wife and children under proper interpretation of treaty provision) (emphasis added).

Cases under the 1907 act include *Low Wah Suey v. Backus*, 225 U.S. 460, 476-77 (1912) (deciding on habeas, *inter alia*, whether "operations of the statute" and "congressional purpose" exempt wife of a United States citizen from deportation as "alien prostitute"); *Lapina v. Williams*, 232 U.S. 78, 88 (1914) (reviewing in habeas corpus "Congress's . . . intent and purpose as expressed in legislation" regarding deportation statute); *Lewis v. Frick*, 233 U.S. 291 (1914) (reviewing on habeas whether deportation statute applied to him); *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) (rejecting the government's "construction of the [immigration] statute" and noting that when "a commissioner of immigration is exceeding his power, the alien may demand his release on habeas corpus").

Cases under the 1917 act include *United States ex rel. Mensevich v. Tod*, 264 U.S. 134, 136 (1924) (resolving dispute over

In this case, petitioners' claim raises a pure question of law: namely, did the BIA err in deciding that the repeal of Section 1182(c) applies to events that occurred before IIRIRA's enactment. This claim concerns solely whether petitioners were denied the opportunity to apply for relief in violation of the statute. As a result of its construction of the 1996 amendments, the BIA held, as a matter of law, that petitioners had lost their eligibility to apply for relief and hence were subject to mandatory deportation. Petitioners thus seek a judicial determination of their statutory eligibility and not review of any discretionary action by the BIA.

The Court has recognized the sharp distinction between legal claims challenging whether an alien was

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"construction of a statute" concerning the alien's claim that designation of Poland as the country to which he should be deported violated the statute); *Weedin v. Chin Bow*, 274 U.S. 657, 659 (1927) (deciding on habeas "construction of this section" governing claim to citizenship); *United States ex rel. Claussen v. Day*, 279 U.S. 398, 400-01 (1929) (deciding what constituted "an entry within the meaning of the [immigration] act" for purpose of determining whether an alien had committed a crime of moral turpitude "within five years after entry"); *Philippides v. Day*, 283 U.S. 48, 50 (1931) (holding 1917 Act's statute of limitations inapplicable to alien under 1924 Act); *United States ex rel. Stapf v. Corsi*, 287 U.S. 129, 132 (1932) (deciding whether an alien's temporary trip abroad subjected him to the "entry" provisions of the Immigration Act of 1924); *Costanzo v. Tillinghast*, 287 U.S. 341, 343 (1932) (determining a "construction of . . . [the immigration] act of 1917" to decide statute of limitations); *United States ex rel. Volpe v. Smith*, 289 U.S. 422, 424-25 (1933) (interpreting "entry" in statute to include reentry); *Hansen v. Haff*, 291 U.S. 559, 562 (1934) (extramarital relations do not constitute "any other immoral purpose" within meaning of the statutory deportation provisions); *Jordan v. De George*, 341 U.S. 223, 226 (1951) ("interpret[ing] the provision of the statute" to decide meaning of "crime involving moral turpitude").

denied the opportunity to apply for a waiver in violation of law, and claims challenging the discretionary manner in which the waiver was adjudicated. For example, in *Jay v. Boyd*, 351 U.S. 345 (1956), the Court explained that an applicant had "a right to a ruling on [his] eligibility" for a waiver, *id.* at 353, based on the "statutory requirements for eligibility." *Id.* at 351. The determination of an applicant's "eligibility" is based on "specific statutory standards" and requires a legal determination. *Id.* at 353. That legal determination is distinct from the actual exercise of discretion, which turns on "who among qualified applicants" should "receive the ultimate relief" – a decision within the discretion of the Attorney General. *Id.* at 353-54.

Because petitioners challenge the BIA's refusal to exercise discretion (and not a discretionary decision), their claim is reviewable in habeas corpus. In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the Court reversed the BIA's denial of discretionary relief and held that habeas corpus review encompassed the BIA's "*failure to exercise* its own discretion" as required by regulation. *Id.* at 268 (emphasis in original). *Accardi*'s exercise of habeas jurisdiction is consistent with a long line of decisions by the courts of appeals during the habeas corpus era reviewing the agency's refusal to exercise discretion as required by law.[10]

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[10] *See, e.g, MacKusick ex rel. Pattavina v. Johnson*, 3 F.2d 398, 401 (1st Cir. 1924) (reviewing finding of statutory ineligibility); *Maniglia v. Tillinghast*, 24 F.2d 489, 491 (1st Cir. 1925) (examining claim of failure to exercise discretion); *Gabriel v. Johnson*, 29 F.2d 347, 350 (1st Cir. 1928) (same); *Stone ex rel. Colonna v. Tillinghast*, 32 F.2d 447, 449 (1st Cir. 1929) (same); *Domenici v. Johnson*, 10 F.2d 433, 437 (1st Cir. 1926) (reviewing finding of statutory ineligibility); *United States ex rel. Devenuto v. Curran*, 299 F. 206, 210 (2d Cir. 1924) (same); *United States ex rel. De Sousa v. Day*, 22

In sum, the immigration laws of this country have never denied a judicial forum to aliens who assert that their deportation orders were issued in violation of the governing statute. While Congress has, on repeated occasions, severely restricted the role of the judiciary and the scope of judicial review over the deportation and exclusion of aliens, those provisions have never been interpreted to preclude a judicial determination in habeas corpus of whether the agency is acting in violation of its statutory authority. Like those prior statutes, IIRIRA should be construed to preserve the scope of inquiry traditionally available in habeas corpus proceedings, irrespective of whether that review takes place in a formal habeas corpus action or through a petition for review in the court of appeals.

C. *Heikkila v. Barber* Demonstrates That The Constitutional Floor For Habeas Corpus Encompasses Petitioners' Claims.

As noted above, the Court's decision in *Heikkila v. Barber*, 345 U.S. 229, explained that habeas corpus had always been preserved for aliens challenging a deportation order. More fundamentally, however, it found that the habeas review exercised throughout that lengthy period was required by the Constitution. Consequently, *Heikkila* confirms that the review exercised by this Court

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F.2d 472, 474-75 (2d Cir. 1927) (finding failure to exercise discretion); *Mastrapasqua v. Shaughnessy*, 180 F.2d 999 (2d Cir. 1950) (same); *United States ex rel. James v. Shaughnessy*, 202 F.2d 519 (2d Cir.) (addressing claim of failure to exercise discretion), *cert. denied*, 345 U.S. 969 (1953); *United States ex rel. Berman v. Curran*, 13 F.2d 96, 98 (3d Cir. 1926) (finding failure to exercise discretion); *Gonzales-Martinez v. Landon*, 203 F.2d 196, 198 (9th Cir.) (upholding finding of statutory ineligibility), *cert. denied*, 345 U.S. 998 (1953).

during the pre-1952 habeas era represents the constitutional floor below which Congress cannot reduce review.

Heikkila twice explained that the pre-1952 statutes rendering immigration decisions "final" had reduced judicial review to the constitutional minimum. The Court assessed the congressional purpose of the provisions along with "a quarter of a century of consistent judicial interpretation." *Id.* at 234. Based on "both the statutes and . . . the decisions of this Court," *Heikkila* found that "Congress had intended to make these administrative [immigration] decisions nonreviewable to *the fullest extent possible under the Constitution.*" *Id.* (emphasis added). The Court repeated that conclusion in a second, equally pointed statement: the "finality" provision enacted by Congress "clearly had the effect of precluding judicial intervention . . . except insofar as *required by the Constitution.*" *Id.* at 234-35 (emphasis added).[11]

The Court's earliest cases in the finality era also make clear that the preservation of habeas is constitutionally compelled. In *Ekiu*, 142 U.S. 651, discussed in point I.B., *supra*, the Court noted that Congress had precluded the review previously authorized in the immigration acts but stated that a resident alien "is *doubtless entitled* to a writ of habeas corpus to ascertain the lawfulness of the restraint." *Id.* at 660 (emphasis added). Even if *Ekiu*'s holding is viewed principally as one of statutory construction, the Court's rationale was plainly not so limited. *Cf. Landon v. Plasencia*, 459 U.S. 21, 33 (1982) (noting that Court's earlier immigration decision in *Kwong Hai Chew v.*

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[11] *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1397 (1953) ("speaking for the Court, Justice Clark there held that judicial review in deportation cases is 'required by the Constitution' ").

Colding, 344 U.S. 590 (1953), involved a holding "of statutory construction but a ruling of constitutional dimension"). *See also Henderson v. INS*, 157 F.3d 106, 112-16, 120 (2d Cir. 1998) (reviewing Court's pre-1952 habeas cases in the finality era and finding that habeas review during that period was constitutionally compelled, stating that government's position that statutory retroactivity claims could be insulated from all review was "to put it mildly, not only at war with the historical record . . . [of] at least a hundred years . . . [but] also hard to square with the core conception of habeas corpus"), *cert. denied*, 526 U.S. 1004 (1999).

Heikkila and the Court's earlier decisions thus establish that the habeas review that was exercised during the pre-1952 finality period is constitutionally compelled. Nor is there any question that the constitutionally-required habeas review endorsed by the Court covers statutory claims. Indeed, as already set forth, *Heikkila* focused specifically on the difference in the scope of review between "judicial review" and habeas corpus, emphasizing that the broader scope in judicial review was precisely what "differentiates" the two forms of review. 345 U.S. at 235-36. Yet, as previously discussed, despite the limited scope of habeas review, this Court (and the lower courts) consistently reviewed statutory claims during the period when the only review available was that "required by the Constitution." *Id.* at 235.

Heikkila itself specifically cited finality-era cases that explicitly stated that the scope of habeas review included statutory claims. For example, *Heikkila* cited to *Kessler v. Strecker*, 307 U.S. 22, 34 (1939), which stressed that although a court "upon habeas corpus" has limited authority, it may overturn an administrative ruling if there is an "error of law." *Heikkila* also twice cited to a particular passage in *Bridges v. Wixon*, 326 U.S. 135 (1945),

that expressly articulated the scope of habeas review during the finality era. *See Heikkila*, 345 U.S. at 230 n.1, 235. That passage states, in relevant part: "[I]n the exercise of their authority to issue writs of habeas corpus . . . courts [are authorized to] inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law or the Constitution. . . . " *Bridges*, 326 U.S. at 167 (Stone, C.J., *dissenting on other grounds*); *see also id.* at 149 (opinion of the court) (exercising jurisdiction on habeas to review whether alien "was ordered deported for reasons *not specified by Congress*") (emphasis added). *See also* note 9, *supra* (collecting cases exercising habeas jurisdiction over review of statutory claims).

In short, when judicial scrutiny had been reduced "to the fullest extent possible under the Constitution," *Heikkila*, 345 U.S. at 234, this Court and the lower federal courts exercised habeas review and that review included statutory claims. Accordingly, the preclusion provision of IIRIRA should be construed to leave some forum for petitioners to raise their pure questions of law. But if it cannot be, the statute must be invalidated as unconstitutional.

II. JUDICIAL SCRUTINY OF PETITIONERS' CONSTITUTIONAL AND STATUTORY CLAIMS IS ALSO GUARANTEED BY THE BROAD PRINCIPLES OF THE SUSPENSION CLAUSE, DUE PROCESS, AND ARTICLE III.

A. The Suspension Of Habeas Corpus Clause Entitles Aliens To Judicial Scrutiny Of Legal Claims Challenging Executive Deportation Orders.

The Suspension Clause provides that "the Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public

Safety may require it." *See* U.S. Const. Art. I, § 9, cl. 2. The "Great Writ" was "[c]onsidered by the Founders as the highest safeguard of liberty" and was "written in the Constitution" for that reason. *Smith v. Bennett*, 365 U.S. 708, 712 (1961). Indeed, the Framers included the Suspension Clause in the original document even though the Constitution included few provisions protecting individual rights before passage of the Bill of Rights.

The writ has always been viewed as an indispensable feature of a country governed by the rule of law: "It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. . . . Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments." *Brown v. Allen*, 344 U.S. 443, 512 (1953) (Frankfurter, J., *concurring*); *see also Parisi v. Davidson*, 405 U.S. 34, 47 (1972) (Douglas, J., *concurring*) (the Court "has consistently reaffirmed the preferred place of the Great Writ in our constitutional system"); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1830).

With respect to the scope of review protected by the Suspension Clause, two points are beyond dispute. First, the common law traditions and usages of the writ in England and this country figure prominently. *See, e.g., Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) ("For the meaning of the term habeas corpus, resort may unquestionably be had to the common law"); *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973) ("By the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement . . . was thus an integral part of our common-law heritage"); *Peyton v. Rowe*, 391 U.S. 54, 59 (1968) ("To

ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law . . . and to the decisions of this Court interpreting and applying the common-law principles") (quoting *McNally v. Hill*, 293 U.S. 131, 136 (1934)). *See also Ex parte Parks*, 93 U.S. 18, 21 (1876).

Second, and critically, the historic core of the writ was to serve as a safeguard against *executive* detention without judicial process, in contrast to the post-conviction relief context where the writ is invoked to challenge *judicially*-sanctioned detention. *See, e.g., Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) (common law habeas writ's "most basic purpose" was to avoid deprivations of liberty by executive "without referring the matter to a court"); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., *concurring*) ("[T]he traditional Great Writ was largely a remedy against executive detention"); *Brown*, 344 U.S. at 533 (Jackson, J., *concurring*) (writ's historical purpose was to test executive detention ordered "without judicial trial"). The Court has thus specifically cautioned against conflating criminal cases involving post-conviction relief with cases where prior judicial review is absent. In stressing this distinction, the Court has specifically cited immigration cases as among those where no prior judicial review has occurred. *See, e.g., Sunal v. Large*, 332 U.S. 174, 177 n.3 (1947) (a direct appeal "could have been taken," and "[w]e therefore lay to one side [immigration and other] cases . . . where the order of the agency . . . was not subject to judicial review") (citing *Bridges v. Wixon*, 326 U.S. 135 (1945)). *See* Pet. App. at 30a (citing *Henderson v. INS*, 157 F.3d 106, 120 (2d Cir. 1998), and stressing distinction under Suspension Clause between post-conviction and executive detention); *Shah v. Reno*, 184 F.3d 719,

723-24 (8th Cir. 1999) (same); *Goncalves v. Reno*, 144 F.3d at 118 n.8.[12]

Where an executive official deprives an individual of liberty, and the executive order has not been "subject to judicial review" at any point, *Sunal*, 332 U.S. at 177 n.3, the scope of the common-law writ has always included review sufficient to ensure that the order is consistent with the *legal* limits on the executive's authority. Thus, as we have already discussed, habeas corpus has always been available in this country to test the legality of deportation orders where no other commensurate review was made available. That specific tradition in the immigration context is consistent with the broader common law habeas traditions, in England and this country, governing the use of the writ to test the legality of executive detention.

The historic purpose of habeas corpus at English common law was to test the *legality* of detention imposed without judicial process. Thus, an inquiry into detention

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[12] Even commentators who have expressed criticism of habeas corpus review in the post-conviction context have emphasized the writ's historic use as a remedy against executive detention without judicial process. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law*, 76 Harv. L. Rev. 441, 475 (1963) ("It should not, after all, be forgotten that the classical function of habeas corpus was to assure the liberty of subjects against detention by the *executive* or the military *without any court process* at all, not to provide postconviction remedies for prisoners.") (emphasis added); Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 465-66 (1966) ("If a seventeenth-century lawyer ever urged that the function or office of habeas corpus was the 'vindication of due process,' he would undoubtedly have had in mind the use of habeas corpus to review executive detentions and to release persons wrongfully imprisoned by the crown") (citations omitted).

included review of questions of law; indeed, England has no formal constitution, and thus, the writ could not be limited to an American understanding of "constitutional" errors. *Shah*, 184 F.3d at 723; *Henderson*, 157 F.3d at 121 n.13. *See generally* William S. Church, *A Treatise of the Writ of Habeas Corpus*, (2d ed. 1893); Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2521-536 (1998) (collecting cases and treatises); *see, e.g., Gardener's Case*, 78 Eng. Rep. 1048 (K.B. 1600).

The common law habeas traditions in this country, both before and after 1789, confirm that, in the *executive* detention context, the scope of the writ has included all review necessary to test the legality of the detention order. The colonies inherited the common law's understanding of the writ from England. William F. Duker, *Constitutional History of Habeas Corpus* 115 (1980). Beginning shortly after the adoption of the Constitution, and consistently thereafter, claims that detention was based on legal error were reviewable in habeas corpus. *See, e.g., Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452-53 (1806) (granting writ of habeas corpus where prisoner was committed pursuant to illegal warrant); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 135-37 (1807) (ordering release of petitioners held on warrant for treason because warrant was not supported by sufficient evidence).[13] *See generally*

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[13] *See also Ex parte Randolph*, reprinted in *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 11 n.1 (1835) (Marshall, C.J.) (interpreting statute under which individual was detained by solicitor of the treasury to determine whether individual fell within statutory provisions); *In re Kaine*, 55 U.S. (14 How.) 103, 114-16 (1852) (deciding legal question of whether commissioner had power under extradition statute to commit detainee); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (writ should issue where military commission did not have legal authority to issue

William S. Church, *A Treatise on the Writ of Habeas Corpus* 217 (1st ed. 1884) ("The issue raised on the hearing of a habeas corpus may be one of law simply. . . . [t]hat is, when the detention of the prisoner is claimed to be illegal, and he claims a legal exemption from it."); Rollin C. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 332 (1st ed. 1858) ("Where the return shows a detainer under legal process, the only proper points for examination are the existence, validity and present legal force of the process").

In short, this case implicates the historic core of the writ, which ensures that executive detention is subject to judicial scrutiny. In this context, habeas corpus practice has always included review of pure legal claims, constitutional and nonconstitutional. The Justice Department cannot have the final say on the meaning of the Immigration Act.

B. Due Process Requires Judicial Determination Of Petitioners' Constitutional And Statutory Claims.

IIRIRA would independently violate the Due Process Clause of the Fifth Amendment if it forecloses judicial scrutiny of petitioners' constitutional or statutory claims. Deportation implicates fundamental interests "basic to human liberty and happiness," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950), and thus, the Court has long held that deportation must comport with the procedural protections mandated by due process. *See Galvan*

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judgment resulting in unlawful imprisonment of petitioner); *Wright v. Henkel*, 190 U.S. 40, 58 (1903) (interpretation of New York state law in extradition case); *Oteiza v. Jacobus*, 136 U.S. 330, 334-35 (1890) (interpretation of extradition statute); *Benson v. McMahon*, 127 U.S. 457, 460-63 (1888) (interpretation of language of treaty in extradition case).

v. Press, 347 U.S. 522, 531 (1954). As the Court repeatedly has recognized, the "stakes are indeed high and momentous for the alien who has acquired his residence here," *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947), and are particularly "weighty" where, as here, the aliens are long-time legal permanent residents who stand to "lose the right to . . . [live with their] immediate family, a right that ranks high among the interests of the individual." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *see also Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (noting that "deportation . . . visits a great hardship on the individual" and that the "liberty of an individual is at stake").

Traditional common law procedural protections provide a critical benchmark in determining whether due process has been violated. While "all deviations from established [common law] procedures" do not result in "constitutional infirmity," the abandonment of well-established safeguards of common law procedure "raises a presumption" that due process has been violated. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-31 (1994). Indeed, the Court has noted that the "basic procedural protections of the common law" have rarely been abandoned in our constitutional history. *Id.* at 430.

In *Honda*, for example, the Court held that eliminating judicial review over the size of jury punitive damage awards violated procedural due process because judicial oversight of jury awards was part of a longstanding "common law practice." *Id.* at 421. The Court noted that the presumption in favor of common law procedural safeguards is particularly strong where, as here, "the absent procedures would have provided protection against arbitrary and inaccurate adjudication." *Id.* at 430. Under such circumstances, the Court "has not hesitated to find the proceedings violative of due process." *Id.*

As in *Honda*, the circumstances here involve long-standing practice. Administrative deportation orders have historically been subject to judicial scrutiny to test their legality. No contrary tradition or practice has ever existed in this country. Individuals subject to deportation by an administrative official have always had recourse, through habeas corpus or some other commensurate means, to judicial scrutiny of the legality of the administrative order.

More generally, where an administrative agency has been vested with the power to deprive an individual of liberty (or traditional property rights), judicial process has been available as a necessary safeguard. Liberty "cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of . . . imprisonment." *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 485 (1894) (affirming power of ICC to compel documents but noting as axiomatic that contempt powers could not extend to ordering imprisonment without any judicial process). *See Superintendent v. Hill*, 472 U.S. 445, 449-50 (1985) (emphasizing that, even in the prison setting, "difficult" due process questions would be raised by the denial of judicial review over an administrative board's decision to deny a prisoner liberty in the form of "good time" credits); *Rodriguez-Roman v. INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., *concurring*) (stressing the "importance of independent judicial review" in immigration "area where administrative decisions can mean the difference between freedom and oppression"). *Cf. Chicago, Milwaukee, and St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 458 (1890) (due process violated where "the company is deprived of the power of

charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery"); *Phillips v. Commissioner*, 283 U.S. 589, 595-97 (1931) (judicial review required for federal statutory tax claim); *South Carolina v. Regan*, 465 U.S. 367, 393 (1984) (O'Connor, J., *concurring*) (noting "the established rule" that due process requires judicial review of tax assessment claims).[14]

The government cannot contend that the danger of arbitrary deprivations of liberty in the immigration area "has in any way subsided over time," *Honda*, 512 U.S. at 432, and thus, that it is unnecessary to provide "a reasonable substitute for" judicial oversight, *id.* at 436 (Scalia, J., *concurring*). Moreover, permitting review of *legal* claims under the narrow common law habeas standard will not

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[14] *See also* Louis L. Jaffe, *Judicial Control of Administrative Action* 384 (1965) ("[A] person may be temporarily deprived of his property (and even, it has been suggested, of his liberty) by an illegal order, but . . . there must be an opportunity ultimately for a judicial test of legality") (internal citations omitted); Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 248 n.48 (1990) ("That all questions arising in the administration of the Interstate Commerce Act, for example, or between a taxpayer and the government under the tax laws, could be committed by Congress exclusively to executive officers, in respect to issues of law as well as of fact, has never been supposed") (quoting *Crowell v. Benson*, 285 U.S. 22, 87 n.23 (1932) (Brandeis, J., *dissenting*); Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 15-16 (1983) (historically, "[j]udicial control . . . [has been] at its maximum when coercive governmental conduct was involved"); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1390 (1953) (stating that "the courts [have] a responsibility to see that statutory authority was not transgressed" in coercive enforcement context).

sanction case-specific review of factual and discretionary determinations that have no systemic impact on the implementation of the Nation's immigration laws. It will, however, permit the courts to ensure that the agency remains within the parameters of its delegated legal authority. *See St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., *concurring*) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous *rule of law* was applied.") (emphasis added).

C. Article III Requires Judicial Scrutiny Of Petitioners' Claims.

Article III, § 1 provides that the federal judicial power shall be vested in judges with tenure and salary protection. The Court has not read the language of Article III literally and has permitted significant federal adjudication to be conducted by administrative agencies. However, the Court has also made clear that Article III protects values that are fundamental to the constitutional plan and imposes critical limits on the use of non-Article III federal adjudicative bodies. *See generally Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847-48 (1986). In particular, the Court has noted that Article III "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government," thereby protecting both structural and individual interests. *Schor*, 478 U.S. at 848 (internal quotation marks and citations omitted).

Typically, the Court's jurisprudence in this area has focused on whether Article III prohibits Congress from placing the *initial* adjudication of certain disputes in an

administrative agency, and has generally upheld such schemes. *See Schor*, 478 U.S. at 852; *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 592 (1985). *But see Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In these cases, however, appellate review has remained available as an ultimate safeguard, and the Article III question was not whether *all* judicial review could be repealed at any stage. *See Schor*, 478 U.S. at 853 (stressing that "the legal rulings of the CFTC . . . are subject to de novo [appellate] review"); *Northern Pipeline*, 458 U.S. at 115 (White, J., *dissenting*) ("[T]he presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers").

Here, the government contends that IIRIRA should be construed to preclude *all* review over petitioners' retroactivity claim, by any means and at any stage – initial and appellate, including in this Court. Thus, under no circumstances can the government contend that its reading of IIRIRA would preserve the "essential attributes of judicial power" in the courts, one of the factors stressed in the Court's Article III cases. *Schor*, 478 U.S. at 851 (internal citations omitted). Furthermore, the issues raised by petitioners are pure legal claims. Review of such claims implicates the core, traditional role of the courts as the ultimate check against ongoing violations of the law. *See Chadha v. INS*, 634 F.2d 408, 431 & n.32 (9th Cir. 1980) (Kennedy, J.) (noting that review of statutory criteria applied by administrative officials is an "essential judicial function" and emphasizing that courts provide an indispensable "structural check on the Executive"), *aff'd*, 462 U.S. 919 (1983).

Moreover, the complete preclusion of review in this case is especially problematic because, unlike in other contexts, the issues that would be insulated from all judicial scrutiny are not politically dry issues that have

been left to an independent agency with expertise over a narrow area of specialization. In *Schor*, for example, not only was appellate review preserved, but the issues there (relating to commodities trading) were ones that Congress could plausibly have assumed would be "relatively free from political pressures." 478 U.S. at 855; *see also id.* at 836 (noting that Congress believed that agency's technical work was in an area that is unlikely to attract the "political winds that sweep Washington") (quoting House Report); *Northern Pipeline*, 458 U.S. at 115 (White, J., *dissenting*) (noting diminished threat to separation of powers where Article I courts adjudicate issues of "little interest to the political branches").

The Attorney General is subject to acute political and public pressure as the official responsible for implementation and enforcement of the immigration laws. Yet the government seeks to confer on the Justice Department the unilateral and unreviewable power to determine the statutory limits on its own enforcement authority. With so much at stake for legal residents facing deportation from the country (including the consequences for U.S. citizen family members), there must be an independent judicial check to ensure that the power of deportation is exercised within the limits set by law. *See generally The Federalist* No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("there is no liberty if the power of judging be not separated from the legislative and executive powers") (quoting Montesquieu); *United States v. Will*, 449 U.S. 200, 219 (1980) (absence of independent judges was "one of the evils that had brought on the Revolution and separation").

Congress may of course choose to give an agency responsibility for both enforcement and adjudication. But the Court has never permitted the commingling of enforcement and adjudication in one agency without any

judicial review of systemic legal challenges directly affecting an individual's liberty. *Compare Monongahela Bridge Co. v. United States*, 216 U.S. 177, 195 (1910) (rejecting due process challenge to commingled procedure, but noting that judicial review always remained to ensure that "[e]xecutive officers conform their action to the mode prescribed by Congress"). As the Court explained in *INS v. Chadha*, 462 U.S. 919, 951 (1983), another case involving immigration relief provisions, "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."

The government has opposed petitioners' Article III argument on the ground that immigration cases involve "public rights." But the Court has refused "to make determinative for Article III purposes the distinction between public rights and private rights" and has stressed that "practical attention to substance rather than doctrinaire reliance on formal categories" must inform the Article III analysis. *Schor*, 478 U.S. at 847-48, 853; *see also Thomas*, 473 U.S. at 586. Thus, any attempt to attribute dispositive or near-dispositive significance to the public nature of the rights at issue in this case is misplaced. In any event, whatever general significance may be attributed to the distinction between public and private rights, that distinction has never been understood, much less applied, to permit the preclusion of all review, including by habeas corpus, where an individual is subject to an administrative deprivation of liberty. Indeed, in the earliest immigration cases under the finality provisions of the 1890s, the Court cited "public rights" cases for the proposition that broad judicial review could be precluded while simultaneously holding that the alien "is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful." *Ekiu*, 142 U.S. at 660 (citing *Murray's*

Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856)).

The Framers unquestionably viewed an independent judiciary as an indispensable feature of a Nation premised on the rule of law, where every individual and group could be assured an impartial assessment of their rights. As Hamilton argued in *The Federalist* No. 78, leaving the judiciary without insulation from the political branches would "be fatal to their necessary independence," thus undermining the requirement "that nothing would be consulted but the Constitution and the laws." *The Federalist* No. 78, *supra*, at 471. Nowhere is the need for independent scrutiny more acutely implicated than in this case, where the personal interests are of profound importance, the issues touch on powerful political and public passions, and the government's proposed construction of IIRIRA would eliminate *all* judicial oversight over the Attorney General's interpretation of his statutory authority.

III. PETITIONERS' CONSTITUTIONAL AND STATUTORY CLAIMS CAN BE REVIEWED IN EITHER THE DISTRICT COURT OR THE COURT OF APPEALS.

The remaining question is whether the proper *forum* for review of petitioners' constitutional and statutory claims is the district court or the court of appeals. Either forum is permissible provided that the scope is commensurate with the level of inquiry historically available via habeas corpus. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977) ("habeas" inquiry can be provided by an adequate mechanism in any court).

1. Petitioners submit that IIRIRA can be construed to preserve review in the court of appeals of petitioners' statutory and constitutional claims, rendering resort to

habeas corpus in the district courts under 28 U.S.C. 2241 unnecessary. Section 1252(a)(1) provides a grant of jurisdiction to the courts of appeals to review final orders of removal by a petition for review. In the absence of the prohibitions contained in Section 1252(a)(2)(C), subsection (a)(1) would plainly permit review of petitioners' claims. As discussed in point I, *supra*, Section 1252(a)(2)(C) prohibits "judicial review" of petitioners' claims, but does not preclude habeas corpus. Therefore, Section 1252(a)(2)(C) should be construed as precluding only the broad review generally available and not the review available in habeas corpus. Aliens with claims traditionally cognizable in habeas corpus could continue to bring their claims by petition for review to the court of appeals, but claims that fell outside of the traditional habeas inquiry would be barred. Section 1252(a)(2)(C) should thus be understood as precluding the court of appeals from engaging in broad "judicial review" but not the narrow "habeas" inquiry that the courts have always exercised in the face of preclusion provisions and, moreover, that *Heikkila* recognized as "constitutionally required." This procedure for review would not mean that aliens subject to Section 1252(a)(2)(C) would file habeas corpus petitions in the courts of appeals. Like other aliens, they would file petitions for review, but unlike in other cases, the courts of appeals' inquiry would be limited to the scope that is required by habeas.

Notably, the government insists that Section 1252(a)(2)(C) should not be read literally but must be interpreted in light of background norms of statutory construction. The government argues that the courts of appeals retain jurisdiction, notwithstanding Section 1252(a)(2)(C), to address "substantial constitutional" challenges to the denial of Section 1182(c) relief. Despite Section 1252(a)(2)(C)'s language, the government argues

that the provision must be read not to bar review of *constitutional* claims unless there is clear and convincing evidence affirmatively barring such review, which it finds lacking here. *See* Pet. App. 28a. But Section 1252(a)(2)(C) should not be read only on the basis of the canon on which the government relies, and not in light of this Court's longstanding practice of refusing to find implicit repeals of habeas corpus in the immigration context. That is particularly true because the government's interpretation of Section 1252(a)(2)(C) would not avoid the profound constitutional questions presented by the statute under the Suspension Clause, Due Process and Article III, if it were to foreclose judicial scrutiny of executive detention based on the BIA's misconstruction of its own governing statute. *See Henderson*, 157 F.3d at 119-20.[15]

2. If Section 1252 cannot be construed to preserve an adequate scope of inquiry in the court of appeals, then 28 U.S.C. 2241 provides the fail-safe procedure for judicial determination of petitioners' constitutional and statutory claims. The government contends that Section 2241 is not available because IIRIRA's permanent amendments have repealed all access to the district courts to challenge final removal orders and that, even before IIRIRA, the amendments made by the 1961 Immigration Act and AEDPA repealed Section 2241 jurisdiction for aliens seeking to challenge a final order of deportation. The Second Circuit thoroughly canvassed the government's arguments and found that none of the provisions on which the government relied mentions Section 2241, much less contains the

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[15] As noted in the Statement, *supra*, the circuits that have held that the proper forum for review is the court of appeals have either left open the question of the available scope of review that would be afforded or have strongly presumed that review of petitioners' retroactivity claim is not foreclosed. *See LaGuerre*, 164 F.3d at 1041.

requisite express directive to repeal that grant of jurisdiction. Pet. App. 15a-19a, 24a-26a.

In *Felker*, 518 U.S. 651, the Court confronted a statutory provision enacted by AEDPA that was unquestionably intended generally to restrict access to the Supreme Court. The Court held, however, that *all* access to this Court was not precluded and that the petitioner in that case could file an original habeas petition under Section 2241 to obtain review of his claims. The Court emphasized that the statute nowhere "mentions" Section 2241. *Id.* at 660. Given the absence of any such express mention, and the delicate constitutional questions that would have arisen had this Court's appellate jurisdiction been wholly eliminated, the Court emphasized the longstanding rule disfavoring repeals of habeas jurisdiction "by implication" and held that Section 2241 jurisdiction had not been eliminated. *Id.* at 660-61.

Here also, IIRIRA does not expressly mention the independent grant of jurisdiction in 28 U.S.C. 2241 (nor is it anywhere mentioned in the Act's legislative history). This Court should not find a repeal of Section 2241 without an explicit directive that Congress deliberately intended to repeal a grant of jurisdiction that has served as one of the cornerstones of liberty in this country since 1789 and to compel this Court to decide the resulting constitutional questions.

As the court of appeals decision sets forth, the government has argued that IIRIRA and earlier enactments satisfy the *Felker* express repeal requirement. Pet. App. 16a. Yet, the government has never disputed that the legislation is devoid of any mention of Section 2241. Instead, it has relied on the various provisions that "channel" review of claims to the court of appeals and has argued that Congress's intention with respect to Section 2241 must be gleaned from those general provisions.

That is necessarily an argument that relies on repeal by implication.

The principal provisions cited by the government are Sections 1252(a)(1) and 1252(b)(9). Both apply to "judicial review" and nowhere mention Section 2241.[16] The purpose of these provisions is to channel claims into the review of final orders in cases where judicial review in the courts of appeals *is* available.[17] No IIRIRA provision specifically addresses whether habeas corpus under Section 2241 is available as a final safeguard to allow claims historically protected by habeas corpus to be reviewed in cases where no other forum is available. *See* Pet. App. 23a, 33a; *Liang v. INS*, 206 F.3d 308, 317 (3d Cir. 2000)

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[16] Section 1252(a)(1) provides that "*Judicial review* of a final removal order [other than one issued against certain aliens excluded at the border] . . . is governed only" by the requirements of the Hobbs Act, except as specifically modified. 8 U.S.C. 1252(a)(1) (emphasis added). Section 1252(b)(9) provides that "*Judicial review* of all questions of law or fact, . . . shall be available only in judicial review of a final order under this Section." 8 U.S.C. 1252(b)(9) (emphasis added). Moreover, subsection (b)(9) appears in subsection (b), which in turn refers back to "review of an order of removal under *subsection (a)(1)*," 8 U.S.C. 1252(b)(9) (emphasis added), which applies only to "judicial review" of a final removal order.

[17] Section 1252(b)(9), in particular, was directed at a very specific issue under pre-IIRIRA practice whereby some claims were litigated in the district courts because the term "final order" in the pre-1996 INA did not encompass all issues arising from deportation proceedings. *See, e.g., Cheng Fan Kwok v. INS*, 392 U.S. 206, 215-16 (1968); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 (1999) (discussing practice). Section 1252(b)(9) was enacted to consolidate additional claims into the review of final orders to ensure that the courts of appeals' review would encompass *all* questions "arising from any action taken or proceeding brought to remove" an alien.

("None of the provisions [of IIRIRA] . . . expressly refers to habeas jurisdiction or 28 U.S.C. § 2241. None expressly revokes habeas jurisdiction"), *petition for cert. filed sub nom. Rodriguez v. INS*, No. 00-753; *Mahadeo v. Reno*, 226 F.3d 3, 8 (1st Cir. 2000) ("IIRIRA's permanent rules . . . lack the kind of explicit language Congress must use if it wants to repeal . . . § 2241"), *petition for cert. filed*, No. 00-962.

The government also argues that, even absent IIRIRA, Section 2241 is not available to challenge final orders because it was eliminated by AEDPA and the 1961 amendments. Cert. Pet. [INS] at 4, 24, *INS v. St. Cyr* (No. 00-767).[18] The 1961 amendments vested the courts of appeals with the "sole and exclusive" review of final orders of deportation, *see* former 8 U.S.C. 1105a(a), but also explicitly provided for habeas corpus jurisdiction in subsection (a)(10). The government contends, however, that Section 1105a(a)(10) was intended to be the only available grant of habeas jurisdiction after 1961 because the courts of appeals were vested with exclusive jurisdiction except as specifically enumerated in Section 1105a. The 1961 amendments, however, nowhere expressly repealed Section 2241, and the circuits that addressed the issue understood that both grants of habeas jurisdiction thus remained available. *See, e.g., Sotelo Mondragon v. Ilchert*, 653 F.2d 1254, 1255 (9th Cir. 1980) (finding jurisdiction to review deportation order under both "1105a(a)(10) and . . . [Section] 2241"); *Orozco v. INS*, 911 F.2d 539, 541 (11th Cir. 1990). Moreover, the 1961 Act's legislative history not only noted the continuing availability of habeas jurisdiction, but specifically referenced

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[18] This contention, that Section 2241 was repealed prior to IIRIRA's amendments, was rejected by ten of the eleven circuits to reach the question. *See* note 3, *supra*.

the federal Habeas Corpus Act.[19] *See Sandoval v. Reno*, 166 F.3d 225, 234 (3d Cir. 1999) (quoting legislative history); *see also Bowrin v. INS*, 194 F.3d 483, 487 (4th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289, 1298 (11th Cir. 1999).

The contention that AEDPA eliminated Section 2241 is likewise erroneous because AEDPA § 401(e), 110 Stat. 1268, repealed only the specific INA habeas provision in Section 1105a(a)(10), and did not mention Section 2241. And, as noted above, the case law against which AEDPA was enacted assumed that both Section 2241 and Section 1105a(a)(10) conferred habeas jurisdiction after 1961. Thus, Congress could not simply have assumed that the repeal of Section 1105a(a)(10) would effectuate a repeal of the independent grant of habeas jurisdiction in Section 2241.

Finally, the government has argued that a repeal of Section 2241 should be found based on the "streamlining" goals of the IIRIRA legislation, notwithstanding the absence of a specific textual repeal of Section 2241. The government maintains that permitting review in a Section

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[19] When it first enacted Section 1105a in 1961, Congress expressly discussed habeas corpus, and the provision's sponsor recognized that Congressional power to limit judicial review of deportation and exclusion orders was constrained by the Suspension Clause. *See* H.R. Rep. No. 1086 (1961) (discussing interaction of new Section 1105a and "Habeas Corpus Act"); 107 Cong. Rec. 12,179 (1961) (remarks of Rep. Libonati) (describing alien's petition for writ of habeas corpus as "constitutional writ"); 107 Cong. Rec. 12,176 (1961) (remarks of Rep. Walter) ("Nothing contained in the bill is, *or can be*, designed to prevent an alien from obtaining review [of a deportation order] by habeas corpus") (emphasis added); *id.* at 12177 (remarks of Rep. Walter) (Section 1105a preserves habeas for excludable aliens because "[w]e were very much concerned over the possibility of writing an unconstitutional statute by depriving even an alien of the right to a writ of habeas corpus").

2241 habeas action gives aliens with criminal convictions an illogical layer of additional review not available to other aliens. However, the scope of review to which aliens are entitled under Section 2241 will be limited to the narrow inquiry required by habeas corpus. In *Felker*, there was little question that Congress's overall goal was to vest the courts of appeals with a "gatekeeping" function and thus generally to eliminate any further review of successive petitions deemed unmeritorious by the courts of appeals. By finding that it could hear such petitions under Section 2241, but imposing stricter standards for reviewing the successive petitions, the Court avoided profound constitutional questions and remained faithful to the broader legislative purpose. Here also, if review in the court of appeals is foreclosed, preserving Section 2241 will avoid the far-reaching constitutional question of whether the complete denial of a judicial forum is unconstitutional, while also reflecting the purpose of IIRIRA by limiting the scope of review for aliens who are deportable based on a criminal conviction.

CONCLUSION

For the reasons stated, if the Court holds that jurisdiction over petitioners' claims is not available pursuant to 28 U.S.C. 2241, petitioners respectfully submit that the judgment of the court of appeals should be reversed to allow petitioners' claims to be adjudicated in the court of appeals by petitions for review.

Respectfully submitted,

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APPENDIX

Section 1252 of Title 8, United States Code (Supp. V 1999), provides in pertinent part:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

. . .

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

* * *

(b) Requirements for review of orders of removal

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(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

* * *

(g) Exclusive jurisdiciton

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

Section 2241 of Title 28, United States Code, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
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> * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> (1) He is in custody under or by color of the authority of the United States . . .
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]